United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1598

To be argued by
WILLIAM F. McNULTY

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

RENEE KALSCHEUR, a minor, by her parents and natural guardians, and NORBERT KALSCHEUR, and ISABEL KALSCHEUR, in their own rights,

Plaintiffs-Appellees,

against

JACK ROUNICK and LOIS ROUNICK, and 215 EAST 68TH STREET, INC.,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS, JACK ROUNICK AND LOIS ROUNICK

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Introductory Statement

This is an action by the eighteen year old infant plaintiff, Renee Kalschuer, who was twenty-four years old at the time of trial, to recover damages for a knee injury she sustained when she walked through a sliding glass patio door leading from an outside terrace to one of the apartments in a luxury apartment building located on east 68th Street in the Borough of Manhattan, City of New York, and by her parents to recover for her medical expenses and loss of services. The defendant, 215 East 68th Street, Inc. (hereinafter sometimes designated "the building"), owned the apartment building, which was comparatively new, and the defendants, Lois and Jack Rounick, the sister and

brother-in-law of Miss Kalschuer, were the tenants of the 20th floor apartment where the accident occurred. Neither Mrs. Rounick nor Mr. Rounick, who had rented the apartment about five years prior to the date of the accident, were at home when the accident occurred but they had left a key to the apartment with the infant plaintiff, whom they allowed to use it while she was in New York looking for a modeling job. The plaintiff had lived in the apartment on at least two prior occasions when she visited New York.

Federal jurisdiction is based on diversity of citizenship and, in determining the substantive rights of the parties, the law of the State of New York is applicable.

Just before the accident occurred the plaintiff was standing on the open-air terrace leading to the dining room of the apartment, with two boyfriends she was going out with that night, and her back was to the sliding glass door which she herself had only minutes before opened and left open. She claimed that, while she was standing on the terrace with one of her boyfriends, looking down at some commotion on the street below, the other boyfriend, without her knowledge, left the terrace, entered the dining room and closed the sliding glass door behind him. She further claimed that the boyfriend with whom she was still standing on the terrace told her that the telephone on the dining room table was ringing and that she hurriedly turned around to enter the dining room to answer the telephone and walked through the sliding glass door, which, it is undisputed, had no markings on the glass and, as she claimed, "looked to me as though it was open" (87a).

The defendants were charged with negligence in failing to warn the plaintiff of the presence of the clear plate glass in the door through which she walked by placing decal markings or other suitable warning signs thereon.

The case was tried before Hon. William C. Conner and a jury in the United States District Court for the Southern

District of New York and resulted in a jury verdict in favor of the plaintiffs and against the defendants in the sum of $31,800.00, which the jury apportioned equally between the owners of the building and the tenants of the apartment the plaintiff was visiting. In answer to specific interrogatories submitted to it by the Court, the jury found that the defendants were guilty of actionable negligence and that the plaintiff herself was free from contributory negligence (223a).

The Rounicks and 215 East 68th St., Inc., the owner of the building, appeal from the judgment in the sum of $31,800.00 thereafter entered against them on said verdict on March 28, 1974, in the office of the Clerk of United States District Court for the Southern District of New York.

Questions Presented

The appeal by the defendants, Jack and Lois Rounick, the tenants of the apartment where the accident occurred, presents the following questions:

1. Under the New York social guest rule, did the plaintiffs establish any duty on the part of said defendants to warn the infant plaintiff of the presence of the pane of glass in the sliding patio door, of which she herself was fully aware prior to the time she walked through it?

   The District Court answered this question in the affirmative (145a-146a).

2. Should the plaintiffs' complaint against the Rounicks have been dismissed or a verdict directed in favor of said defendants at the close of the evidence on the ground that no proximate causal connection was established between their failure to place decals or other warning markings on the pane of glass

through which the infant plaintiff walked and the occurrence of the accident resulting in her injury?

The Court below answered this question in the negative (145a-146a).

3. Did the District Court commit error, highly prejudicial to the Rounicks, in refusing to grant their request to charge that, if the jury found that "an intervening act of the plaintiff's friends was a substantial cause of her injury and the proximate cause" thereof, "defendant's possible negligence is broken and you must find for the defendants Rounick" (205a)?

The Court below answered this question in the negative (205a-206a).

Relevant Facts

The accident herein occurred sometime between 10:00 and 10:30 o'clock on the night of June 10, 1968, which was a moonlit Wednesday night (84a, 89a, 142a, 168a, 283a). Neither of the Rounicks, who were married at the time—but have since been divorced (36a, 48a, 80a)—and resided in the apartment where the accident occurred, was present when the accident occurred because Mrs. Rounick left a couple of weeks before on her summer vacation in East Hampton, New York, and Mr. Rounick, who was eating out that evening, had not yet returned to the apartment (51a-52a, 82a, 84a-85a).

Mr. Rounick was the sole lessee of the apartment, which he had first rented about five years before when the building was new (164a). Although it is undisputed that the panes of plate glass in the patio doors leading to the outside terrace of the apartment were unmarked with decals or stickers or other warning signs on the date of the accident (42a, 165a), it is also undisputed that they had never been broken or shattered by anyone prior to the night that the infant plaintiff, who was an 18 year

old student in junior college at the time (37a, 80a), attempted to walk through one of them (164a).

The apartment, which was located on the 20th floor of the building owned by the co-defendant at No. 215 East 68th Street, faced north on 68th Street, just east of Third Avenue, which could be seen by standing on the terrace outside the dining room (68a, 85a). The apartment was a five room apartment and the dining room, which was about 9 by 12 feet, led out onto the terrace, which was only about five or six feet wide, through a sliding glass patio door (37a, 56a, 71a, 95a).

Mrs. Rounick, who was called as a plaintiffs' witness at the trial, testified that a good view of New York was afforded from the dining room looking out toward the terrace, when the full length curtains she had hung in front of the patio doors leading to the terrace were drawn all the way back flush with the wall on either side of the doors (62a-63a). The apartment was centrally air conditioned on the date that the accident occurred (63a).

Three different views of the outside terrace, taken from inside the dining room on the other side of the patio doors, are shown in the photographs marked Plaintiffs' Exhibits 1 through 3, which were identified at the trial as accurately representing this part of the apartment on the date of the accident (38a, 275a-277a). A view taken from outside on the terrace looking into the dining room, as it existed on the date of the accident, is shown in the photograph marked Plaintiffs' Exhibit 4 (39a, 278a).

The patio doors took up most of the 12-foot-wide wall of the dining room and each door was approximately five feet wide and six feet, nine inches high (71a, 109a-111a). The glass portion of the sliding door through which the infant plaintiff walked was four feet, nine and a half inches wide and six feet, four and a half inches high (110a, 112a). It was surrounded by a metal door frame two and a quarter

inches wide (112a). Only the sliding portion of the two patio doors moved and it slid half way across the opening leading to the terrace in front of the other glass door which remained stationary (42a). As one stood inside the dining room, the sliding glass door was to the left and the stationary glass door was to the right (42a). In the center of the sliding glass door was a lock that could be opened by pulling on a silver metal handle on the left frame of the sliding door, which is identified by the red arrow on the photographs marked Plaintiffs' Exhibits 1 and 3 (66a, 71a, 275a, 277a). The door lock on the center strip of the sliding door is also designated by a red arrow on the photograph marked Plaintiffs' Exhibit 2 (70a, 276a). According to Mrs. Rounick, one could see this lock and door handle from inside the dining room but not from a point on the terrace outside the dining room, by looking straight at it (70a-71a). From outside on the terrace the sliding glass patio door could be opened, and closed, by pulling on a one and a quarter inch protruding aluminum lip or verticle edging on the outside of the door, which is shown at the extreme right hand frame of the sliding door shown on the left of the photograph marked Plaintiffs' Exhibit 4 (113a, 278a). The sliding door ran in a groove or track in an aluminum door saddle or treadle located on the underside of the left part of the doorway, which is shown at the bottom of the photograph marked Plaintiffs' Exhibit 3 (111a, 130a, 277a). On either side of this aluminum saddle there was a sill, which was made of polished mahogany on the dining room side of the door and of white masonry on the terrace side (58a, 112a, 131a). The polished mahogany sill was eight and three quarter inches wide and the masonry ledge was about five inches wide (112a, 131a). The height of the mahogany sill above the floor of the dining room was about 6 or 7 inches and the height of the masonry sill above the surface of the terrace was an inch or two more than that (58a, 60a, 72a, 112a). Mrs. Rounick identified the magogany sill as the

shiny piece of wood shown on the bottom of Plaintiffs' Exhibit 3 (58a, 277a).

In order to enter the dining room from the terrace, one had to step over the masonry sill on the terrace side of the sliding patio door, or else "stub your toe" on it (61a). The floor of the dining room was covered with "a dark blue and green tile that looked like ceramic", which the Rounicks' maid kept clean and waxed (57a, 61a). On the date that the accident occurred there was a brass chandelier hanging from the ceiling of the dining room that had six 20 watt bulbs in it (43a, 56a, 58a). There was no light, however, out on the terrace, so that the only light which illuminated the terrace at night was that which came from the brass chandelier inside the dining room (43a, 57a).

During her direct examination by plaintiffs' counsel Mrs. Rounick, who had been out on the terrace at night, admitted that the glass portions of the patio doors "were difficult to see from the outside", while the light inside the dining room was on and that, "unless you are totally aware of glass in front of you, you cannot see" the glass because "There is no reflection" of the inside light on the outside pane of plate glass (44a, 45a). However, when she was asked the same question by her own counsel on cross-examination, she testified, "I don't know; you know, I don't recall", if the inside light reflected on the glass nor could she recall whether the dining room light reflected down on the dining room floor (57a). When she was asked if, while on the terrace at night, she ever noticed "a shiny reflection on that shiny board on the step up?", she at first testified, "Absolutely not", but she then admitted, "I really don't recall" (58a-59a).

At the trial the plaintiffs called as an expert a building construction engineer, named John Flynn, who had inspected the premises about a week before trial, and he testified that, in his opinion, when the inside of the

dining room was illuminated, "the visibility of the glass" in the patio doors from the outside of the darkened terrace "is reduced" because, "If you illuminate that background [in the dining room], you cut out the reflectance of light from outside, and the glass tends to become invisible" (121a).

According to Mrs. Rounick, as a result of two prior incidents involving the sliding glass patio door—one in September of 1967, when her husband "bumped his head" on the glass as he was re-entering the apartment from the terrace, and the other at the end of May of 1968, just prior to the date of the accident herein, when a person visiting the apartment had some difficulty with the door—she complained on each occasion to "a gentleman named Archie who was in charge of maintenance [in the building] that I usually spoke to with regard to my individual requests" and "I asked him for something for the windows and he suggested decals, and I said, I asked him to get them, which he said he would do", but that he never did (46a-49a). On the second occasion when she spoke to "Archie" Mrs. Rounick testified that "I once again called maintenance and asked if they could do something to help me get decals that they promised, and why couldn't I go get them. And they said no, no, they would take care of it" and "I should not do it myself", but that the matter was not taken care of by the building (49a-50a, 53a-54a). Although Mrs. Rounick claimed that the "Archie" to whom she spoke about putting decals on the patio door "was the gentleman that was in charge of maintenance, whatever his title was", she was undoubtedly confused about the man's name being "Archie" because the building called Mr. Herbert Luber, its superintendent at the time of the accident, who testified that the only "Archie" that worked for the building was "Archie Tessyman", whose job application, marked defendant building's Exhibit 4 (285), showed that he did not apply for employment there until about a year after the date of the accident

(171a-172a). Archie Tessyman was dead at the time of trial and his employment record card shows that he started as a handyman in the building on May 17, 1969 and was appointed assistant superintendent three years later (172a, 284a).

The defendant, Jack Rounick, a portion of whose deposition taken on his examination before trial herein was read into evidence by the building, testified that he himself never requested the landlord to put any markings or notations on the glass patio doors in his apartment (164a). According to his wife, however, he complained to her about the doors and asked her "to do something" about them, "so that this [his bumping his head] wouldn't happen again", which she did by contacting the maintenance department in the building (48a-49a). When Mrs. Rounick was asked on direct examination who would usually make repairs in the apartment when repairs were needed, she testified, "There were many people in the maintenance department and it could be one of, I would say six different men" (52a).

As this Court will see when it examines the same, the written lease between Mr. Rounick and the landlord, which was marked into evidence as Defendant, Building's Exhibit 5, specifically prohibited the tenants themselves from making any "alterations, decorations, additions or improvements in or to demised premises without Landlord's prior written consent, and then only by contractors or mechanics approved by Landlord" (Dft's Exh. 5, para. 4).

Rule No. 4 of the Rules and Regulations annexed to the lease provided (Dft's Exh. 5, 295):

> "No sign, advertisement, notice or other lettering shall be exhibited, inscribed, painted or affixed by any Tenant on any part of the outside or inside of the demised premises or building without the prior written consent of the Landlord."

Mr. Luber testified that, although the maintenance department in the building kept a record of repair notices from the tenants on a "yellow pad", these records were discarded by him after a year had elapsed (178a).

At the conclusion of the evidence, the Trial Justice initially reserved decision on the Rounicks' motion to dismiss in the main action, made on the ground that "under the lease here the tenant had no right to make any alterations, decorations, additions or improvements without the landlord's prior written consent" and "that we could not under the lease be permitted to make any changes in this window" (187a-188a), but he later revised his thinking on this point and denied their motion to dismiss, as well as their motion for full indemnity over against the building under their cross-complaint, which was reserved for decision by the Court (212a-213a).

The circumstances surrounding the occurrence of the accident herein are unusual, to say the least.

It is undisputed that, on the night the accident occurred, Miss Kalscheur, the sister of Lois Rounick, who had come to New York for the summer after completing her first year of study at Harcum Junior College in Philadelphia, was the guest of the Rounicks until she could get settled in the city (37a, 73a, 80a). The purpose of her visit to New York was to secure employment with a modeling agency, which she did (83a).

She had stayed in her sister's and brother-in-law's apartment on at least two other occasions prior to this visit, once during the Thanksgiving holidays in 1967 and once over the Christmas-winter recess in 1968 (80a-81a, 92a). She testified at her examination before trial that she also visited the apartment and stayed there on a number of other occasions when she made weekend visits to her sister (92a). She admitted that on these occasions "I had seen the [patio] doors" and knew that they were

there (93a). Mrs. Rounick testified that her sister visited her and stayed in the apartment about four days in 1967 and also occupied it, while she was in East Hampton, Long Island, for about two weeks prior to the date of the accident (65a, 69a). Although Mrs. Rounick did not provide her sister with a key during her first visit in 1967, she did give her a key to the apartment on the occasion of her visit in June of 1968 (65a, 69a).

It is undisputed that the plaintiff was nearsighted and wore corrective lenses for this condition (65a, 88a, 90a). During her first four-day visit to the apartment in 1967, Mrs. Rounick testified that the draperies in front of the patio doors were left open "Most of the time" (65a) and that she showed her sister "how to unlock the door from the patio—from the dining room to the terrace" and "showed her where the handle was to open the door" (70a).

Just before the accident occurred the infant plaintiff testified that she was waiting for her brother-in-law to return to the apartment, along with two of her boyfriends, who apparently lived in New York but whom she could not locate as witnesses for the trial, a Michael Wright and a Michael Kelly, so that the foursome could then go out for the evening (84a-85a). After waiting for Mr. Rounick in the living room for about a half an hour with the two boyfriends, the infant plaintiff testified that she and her two boyfriends heard some sirens and noise down in the street below and "I knew there was a terrace, so I said, let's look from the terrace" (85a). She described the accident which thereafter occurred and the events leading up to its occurrence as follows (85a-86a):

> And we went into the dining room and the curtains were closed, so I opened the curtains and then found the lock in the middle, and unlocked the door, And I opened it and I went out. And then Mike Kelly and Mike Wright followed me. And I went to stand to-

wards Third Avenue, so I was closest (108) to the—I was furthest on the left. And Mike Wright was standing next to me and Mike Kelly was standing next to him.

Q. Before you go on, Renee, when you opened the door, did the door make any noise? A. No.

Q. What was the condition of the glass? Did you see anything on the windows at all, the glass windows? A. No.

Q. Did they appear that night, except of course for different lighting conditions, but did they appear, the glass doors, substantially as these photographs show that they did? A. Yes.

Mr. Conway: What number is that exhibit, please?

Mr. Krimsky: I showed P-1.

Q. You slid the door open from which side to which side? A. Left to right.

Q. You said you walked out. Did you say you walked out first; I'm sorry. A. Yes.

Q. And the two gentlemen followed you? A. Right.

Q. How wide had you opened the door? A. I opened it all the way, because I turned around to watch them follow me, and they were side by side, so it had to (109) be all the way.

Q. And then you were standing on the terrace, you said? A. Right.

Q. You were the closest to Third Avenue and Mike Wright was next to you and Mike Kelly was next to him. How long had you been out there? A. I would say between five and ten minutes, not more than that, definitely.

Q. During that time did you have any conversation? A. Yes. I don't remember what was said, but we were definitely talking about what we were trying to figure out was going on.

Q. Was going on where? A. Up on Third Avenue. We couldn't really see. We heard a lot of noise and saw a lot of cars.

Q. Then what happened? A. Then Mike Wright said to me that the phone was ringing. And I was expecting Jack to call, so I turned around and—

Q. Which way did you turn? A. I turned to my left, because that was the closest way to go.

Q. Which would be away from the other fellows? A. Right. And I looked ahead of me, and I saw that (110) the door was open, or it looked to me as though it was open, very definitely. And I walked in to get to the phone, and when I—I stepped up, because you could step—well, it doesn't matter, but you could step all the way over the little ledge, and that's what I think I had in my mind, and the glass broke all around me, on the floor, and I looked ahead of me and Mike Kelly was coming in from the living room and he said, 'Oh, my God, are you all right,' I'm sorry. And he said that he had closed the door, and then I looked at my leg and I could see a big white hole. And then I knew that there was something the matter, and it started to bleed, and I started to cry.

That's what happened.

Q. Renee, when you were coming into that space that you thought was an open door, you said you brought your right foot up, put it up a step, or whatever. Did anything come in contact with anything at that point? A. My knee hit the glass first and I put my hands up like this."

The plaintiff testified that she raised her hands in order to protect her face, which was not injured (88a). When she turned to the left to enter the apartment, she admitted that she was walking "Fast" or moving "very quickly" (88a, 100a). Although she knew that the telephone was only five or six feet away from where she was standing

on the terrace, she admitted that she entered the room "in a hurried fashion" (96a, 102a). She also claimed that before she struck the glass she looked down and observed the "track" on which the patio door ran which, of course, as her own expert witness, Mr. Flynn, admitted, would have meant that the sliding door was at least partially open and not closed completely, as she claimed it was, when she walked into the pane of glass (97a, 131a-133a).

When the infant plaintiff was asked on cross-examination if she knew how the terrace door opened, she testified, "Well, by looking at them [the doors] I could tell" (90a). Although she at one point claimed that she had never been out on the terrace at night prior to the night of the accident, at another point she testified that she was "not sure if I had been out there before" (81a, 90a, 92a). She denied that on the previous occasions she had visited the apartment it was her habit to leave the patio door open after going out on the terrace but, when she was confronted with her testimony on her examination before trial that this was her habit, she testified, "I must have said it if it is written there" (90a-92a). She admitted that she was not paying any attention to where Kelly was while she was standing out on the terrace with Wright, looking down at the street, and that, once she turned around after Wright told her that the phone was ringing, "I just kept going" through the plate glass in the door after her knee struck it and "I didn't stop," so that she was still standing upright inside the dining room after she shattered the glass in the door (99a). Although she admitted that she may have "brushed against" the glass in the door on prior occasions, she claimed that "I don't remember ever bumping into it" before this accident occurred, despite her pre-trial testimony to the contrary (99a-100a). According to the infant plaintiff, she took only four steps from her stationary position out on the terrace before she completely shattered the glass with her right knee and went right through it in an upright position (88a, 100a-101a).

She claimed that the reason her glasses did not break was because "I had my hands up" over her face (100a). Fortunately, the plaintiff sustained no injury of any kind to her face.

Charge and Requests to Charge

At the outset it is important to note that the liability of the Rounicks in the case at bar, if any exists, must be predicated on a violation by said defendants of some duty of care which they owed to the infant plaintiff, as a "social guest" in their apartment, under the social guest rule as laid down by the courts of New York. The liability of the owner of the building, however, is predicated on the claimed breach of its duty to keep the portion of the building involved herein in a reasonably safe condition for the guests of its tenants.

In submitting the case to the jury against the Rounicks, the Court charged (199a-200a):

> "Insofar as concerns plaintiff's claim against the tenant, the tenant owes no duty to his social guests to discover possible dangers in the premises. However, if the tenant actually knows that there exists on the premises a dangerous condition which presents an unreasonable risk of harm to his guests, and that the guests are not likely to discover the condition and to realize the risk, the tenant has a duty to exercise reasonable care either to correct the condition or to warn his guests of the condition and risk. Thus, if you find that the tenants knew that the glass panel door was dangerous and that their guests would not be likely to realize the danger and the dangerous condition was a proximate cause of Renee's injury and that Renee did not contribute to the accident by her own negligence, you will return a verdict against the tenants.
>
> If, on the other hand, you find either that the tenants did not know that the glass panel door was dangerous

or that the tenants had a right to expect that their guest (491) would realize the danger or if you find that Renee failed to exercise reasonable care for her safety, then your verdict must be for the defendants."

On the equally important issue of proximate cause, the Court merely gave the jury the following general and abstract instruction of what constitutes proximate cause (198a):

"Second, as to the requirement of proving proximate cause, an act or omission is a proximate cause of an injury if it is a substantial factor in bringing about the injury, either immediately or through a natural and continuous sequence unbroken by any intervening cause."

At the conclusion of the charge the following occurred (205a-206a):

"Mr. Conway: I respectfully except. I have a request here.

The Court: All right.

Mr. Conway: I ask your Honor to tell the jury that if they find an intervening act of the plaintiff's friends was a substantial cause of her injury and the proximate cause of any, defendant's possible negligence is broken and you must find for the defendants Rounick.

Mr. O'Donnell: I join in that request, your Honor.

The Court: I have already given them the general charge in defining proximate cause as including a continuous chain of causation unbroken by any intervening cause.

Do you want to comment on that?

Mr. Krimsky: The only thing I can say as to that, if you get involved in that, your Honor, there can be one or more—it has to be even though there is intervening cause, and you put it to the jury already, so

long as the act or the (503) omission was a substantial factor, even though there may be other factors, they could still find in behalf of the plaintiff. You have indicated that to them.

Mr. Levy: Not only that, your Honor, the intervening act must be a superseding act.

Mr. Conway: If it is a substantial cause.

Mr. Levy: And we are not talking about a really different act. The act of negligence is the windows, where they are and when they are, the fact that somebody moves a window is part of the hazard created by the defendant.

The Court: I think my definition is sufficient. I am afraid if I mention the intervening act I give it undue suggestiveness and they might infer from that that I consider that an intervening act.

Mr. Conway: I think it is a substantial factor that should have been charged in the main charge.

The Court: I don't believe there is a request for that charge. I am afraid if I go back to it it now I am going to give it an undue suggestiveness.

Mr. Conway: I respectfully except.

Mr. O'Donnell: I join in that, sir."

FIRST POINT

The complaint herein should have been dismissed or a verdict should have been directed in favor of the Rounicks at the close of the evidence on the ground that the plaintiffs clearly failed to establish a cause of action against said defendants under the social guest rule in New York.

Few principles of law are more firmly established in New York than the principle that the only duty that the owner or occupier of premises owes to a social guest is to refrain from inflicting willful or wanton injury on his person and to warn him of dangerous conditions, such as

traps or hidden hazards, on the premises "known to defendant and not likely to be discovered by plaintiff" or the guest.

> *Krause* v. *Alper,* 4 N.Y. 2d 518, 520-521 (1958);
> *Sideman* v. *Guttman,* 38 A.D. 2d 420, 429-430 (App. Div. 2nd Dept., 1972);
> *Honig* v. *Rebell,* 40 A.D. 2d 701 (App. Div. 2nd Dept., 1972).

Krause v. *Alper, supra,* which was decided by the New York Court of Appeals in 1958, is one of the leading New York cases in this area.

In *Krause* the infant plaintiff, a boy 11 years of age, was invited onto the property of the defendant to play basketball with the defendant's son. The defendant had improvised a basketball court on the cement driveway leading to his garage by erecting a basketball hoop over the door of his garage. While the infant plaintiff was attempting to retrieve a "rebound", he stumbled over a wooden doorstop that had been placed alongside the driveway to prevent the garage door from opening too far and fell and fractured his arm. The boy had previously played basketball on the defendant's property and was as fully aware of the presence of the wooden doorstop alongside the cement driveway as the infant plaintiff in the case at bar was aware of the presence of the unmarked sliding glass door leading out onto the terrace of the Rounick apartment.

In unanimously reversing a judgment in favor of the infant plaintiff and dismissing his complaint, the New York Court of Appeals stated (pp. 520-521):

> "Repeated decisions of this court have approved the principle of law that a social guest is viewed in the eyes of the law not as an invitee but as a licensee despite the fact that such person was on the premises

pursuant to an invitation from one in possession (*Higgins* v. *Mason,* 255 N.Y. 104; *Wilder* v. *Ayers,* 2 A D 2d 354, affd. 3 N Y 2d 725; *Traub* v. *Liekefet,* 2 A D 2d 22, affd. 4 N Y 2d 747 (see, also, *Comeau* v. *Comeau,* 285 Mass. 578, 581, 582; Prosser on Torts 2d ed., 1955, § 77, pp. 445, 446, 447; Restatement, Torts, § 331, comment a, subd. 3).

That rule has been applied in circumstances, where, as in the present case, the social guests were infants (*Klein* v. *Ramapo Park,* 253 App. Div. 824; *Droge* v. *Czarniechi,* 285 App. Div. 1052, affd. 2 N Y 2d 897). In other words, a social guest, having the status of a licensee, must take the premises as he finds them, and he is entitled to no greater protection than the members of the family.

The defendant, therefore, owed the infant 'only the duty to exercise reasonable care to disclose * * * dangerous defects known to defendant and not likely to be discovered by plaintiff''. *(Bernal* v. *Baptist Fresh Air Home Soc.,* 275 App. Div. 88, 96, affd. 300 N.Y. 486).

Although the rule enunciated by the Court of Appeals in *Krause* was recently characterized as "out-moded" by the Appellate Division of the Supreme Court in the Second Judicial Department in *Sideman* v. *Guttman, supra,* which was decided in 1972 and involved a social guest who slipped on a throw rug while she was visiting the home of the defendants, the rule was nevertheless unanimously applied by the Court in that case.

It is submitted that in the case at bar there is not a shred of proof to support a jury finding of liability on the part of the Rounicks under the social guest rule enunciated by the New York Court of Appeals in *Krause,* in which it was held that a social guest is "entitled to no more protection than the members of the family" of his host.

In moving to dismiss the complaint herein against them or for a directed verdict in their favor, the Rounicks squarely took the position that because the infant plaintiff was a "social guest" in their apartment, "Our only duty is to use reasonable care to disclose any danger known" to them "but not likely to be discovered by Miss Kalschuer" herself (145a). The Court, however, denied the motion because, as he stated, "I believe there are questions that should go to the jury" and due exception to this ruling was taken by the Rounicks (146a).

If there could be any doubt that the complaint herein should have been dismissed against the Rounicks or that a verdict should have been directed in their favor, it is submitted that this doubt is dispelled by the recent decision of the New York Court of Appeals in *Bua* v. *Fernandez*, 15 N.Y. 2d 664 (1964), revg. 21 A.D. 2d 887 (App. Div., 2nd Dept., 1964), which on its facts is indistinguishable from the case at bar.

In *Bua* an infant social guest in the home of the defendants, who was only half the age of the infant plaintiff in the case at bar, blindly walked into a glass sliding door leading from a playroom where she was playing with one of the defendants' children, to an outside patio, and was injured. Although the child, like the infant plaintiff in the case at bar, knew that there was an unmarked pane of glass in the sliding door because she had previously opened the door on other occasions when she had visited the defendants' home, she claimed that on this particular occasion she thought the door was open. As in the case at bar, she claimed that the presence of the unmarked glass in the door created an illusion that the door was open.

In affirming, by a 3 to 2 decision, a judgment in favor of the infant plaintiff and her parent, the Appellate Division of the New York Supreme Court in the Second Judicial Department (21 A.D. 2d 887) held:

> "The infant plaintiff 'having' the status of a licensee, the defendant [landowner] owed him 'the

> duty to exercise reasonable care to disclose * * * dangerous defects known to defendant and not likely to be discovered by plaintiff' " (*Brzostowski* v. *Coca-Cola Co.*, 16 A D 2d 196, 199). Under the circumstances here, whether the defendant owner properly discharged his duty was an issue of fact (cf. *Brzostowski* v. *Coca-Cola Co., supra*).

The two dissenting Justices in the Appellate Division voted to reverse and dismiss "on the ground that under the circumstances here the glass door did not constitute a trap or hidden danger of which the infant plaintiff, a social visitor, was unaware; and hence the defendant owner did not have any duty to give said plaintiff special notice or warning with respect to such door" (21 A.D. 2d 887-888).

The New York Court of Appeals thereafter reversed the order of the Appellate Division and dismissed the complaint of the plaintiffs "upon the dissenting memorandum at the Appellate Division" (*Bua* v. *Fernandez*, 15 N.Y. 2d 664, 665).

It is the contention of the Rounicks on this appeal that the decision of the New York Court of Appeals in *Bua* is in all respects determinative of the issue of their liability in the case at bar and mandates a reversal of the judgment appealed from and a dismissal of the complaint of the plaintiffs against them in the case at bar.

Lest it be argued by the plaintiffs that the Rounicks, in maintaining an optical illusion of openness in the sliding glass door, without warning the infant plaintiff that this was a danger she faced or without removing the danger itself by placing markings on the glass, violated the New York social guest rule, on the ground that this was a condition of which the infant plaintiff was unaware just prior to the occurrence of the accident, it is submitted that this argument was urged and rejected by the New York Court of Appeals in *Bua*. Furthermore, such a contention com-

pletely overlooks the well settled New York rule that if "the plaintiff's own evidence demonstrates that 'any risk to be perceived' was as perceptible to plaintiff as to defendants", then it "must color the acts of the former as well as the latter" (*Nucci* v. *Warshaw Constr. Corp.*, 12 N.Y. 2d 16, 18).

The point here is not whether the infant plaintiff was unable to discern the presence of the glass in the sliding patio door just prior to walking into it but whether, under her own proof, she should have been charged with the same duty of care in checking to see whether the door was in fact open or closed before walking through the doorway as either of the Rounicks themselves would be under similar circumstances. Since it is undisputed that she was just as much aware of the fact that there was an unmarked pane of glass in the door as the Rounicks were, she has no more right to recover against them in the case at bar than they would have to recover against the landlord, if they had blindly walked into the glass and had been injured.

In passing, it is interesting to note that this is not the first time that the plaintiff in a personal injury action has attempted to excuse her own contributory negligence by claiming that the condition which caused her injury created an "optical illusion". Such a claim was recently made and rejected by the Appellate Division in the First Department in *Stillman* v. *Frankel,* (reported in New York Law Journal under date of May 31, 1974, not at this writing officially reported), where an 86 year old woman fell and fractured her hip because she failed to observe two steps on a plaza located in front of the office building owned by the defendant. A similar claim was made and rejected by the Appellate Division of the Supreme Court in the First Department in *Brooks* v. *Bergdorf-Goodman Co.*, 5 A.D. 2d 162, where a patron of the store operated by the defendant failed to observe two steps leading from an upper to a lower level on the ground floor of the store, even though the plaintiff in that case was an "invitee" on the premises.

Wholly apart from the question of whether or not the Rounicks breached any duty of care that they owed to the infant plaintiff under the New York social guest rule, the Rounicks further contend that the judgment appealed from should be reversed and that the complaint of the plaintiff against them should be dismissed on the ground that, assuming *arguendo* that said defendants violated some duty of care which they owed to the infant plaintiff under the New York social guest rule, there was no proximate causal connection between their claimed negligence in this regard and the accident resulting in the infant plaintiff's injury, which patently was caused by the contributory negligence of the infant plaintiff herself in rushing headlong into the dining room of the apartment to answer the telephone, without taking the trouble to ascertain whether or not the sliding door was still open.

In New York it is well settled that, where the facts surrounding the occurrence of an accident are undisputed —as they are in the case at bar—the issue of proximate cause is one of law for the Court and not one of fact for the jury (*Colban* v. *Petterson Lighterage & Towing Corp.*, 19 N.Y. 2d 794, 796 [1967]; *Tsitsera* v. *Erie R.R. Co.*, 14 N.Y. 2d 855 [1964]; *Rivera* v. *City of New York*, 11 N.Y. 2d 856, 857 [1962]). It is equally well settled in New York that the test of proximate cause is reasonable anticipation or foreseeability (*Palsgraf* v. *Long Island R.R. Co.*, 248 N.Y. 339, 344 [1928]; *Saugerties Bank* v. *Delaware & Hudson*, 236 N.Y. 425, 430 [1923]; *Dunn* v. *State of New York*, 29 N.Y. 2d 313, 318 [1971]).

Measured by this criterion, it is submitted that the Rounicks would have had to possess something akin to prophetic vision to have anticipated that an 18 year old girl, who was as familiar with the presence of the sliding glass door involved in the case at bar as the infant plaintiff admittedly was, would attempt to walk through this door without first ascertaining whether or not it was open, which would have been the simplest thing in the world for her to have done.

SECOND POINT

Assuming *arguendo* that the plaintiffs established a cause of action against the Rounicks under the social guest rule of New York, said defendants were grossly prejudiced by the refusal of the District Court to charge that if the jury finds that the intervening act of Kelly in closing the patio door while the infant plaintiff was out on the terrace was "a substantial cause of her injury", it must find in favor of the Rounicks (205a).

As already noted, the above request to charge on the issue of proximate cause was made by the Rounicks and joined in by the co-defendant building (205a).

In denying said request, the Court stated (205a):

> "I have already given them the general charge in defining proximate cause as including a continuous chain of causation unbroken by any intervening cause.
>
> * * *
>
> "I think my definition is sufficient. I am afraid if I mention the intervening act I give it undue suggestiveness and they might infer from that that I consider that an intervening act."

When counsel for the Rounicks thereafter pointed out that this was "a substantial factor" bearing on the issue of proximate cause that "should have been charged in the main charge", the Court again stated, "I am afraid if I go back to it now I am going to give it undue suggestiveness" and, accordingly, adhered to his original ruling on this point and the defendants again took due exception to the refusal of the Court to cover this matter in his charge (205a-206a).

Assuming *arguendo* that any negligence whatever on the part of the Rounicks was establishesd at the trial of this action—which said defendants do not for one moment con-

cede to be the fact—the question of whether or not the chain of proximate causation between such negligence and the injury sustained by the infant plaintiff was broken by the intervening negligence of Kelly in closing the sliding door behind the plaintiff, without informing her that he had done so, obviously was a vital factor in this case that should have been considered by the jury, within the context of the specific act of Kelly in closing the door, as part of its determination of the issue of proximate cause herein, rather than in the context of the very general and purely abstract statement of what constitutes proximate cause which the Court had previously given to the jury (198a).

It seems superfluous to say:

> "The trial court's instructions 'should state the law as applicable to the particular facts in issue in the case at bar, which the evidence in the case tends to prove; mere abstract propositions of law applicable to any case, or mere statements of law in general terms, even though correct, should not be given unless they are made applicable to the issues in the case at bar. * * * Thus, in negligence actions mere abstract rules applicable to any negligence case, or mere statement of the law of negligence in general terms, even though correct, should not be given unless made applicable to the issues in the case at bar.' (53 Am. Jur., Trial, § 573; 38 Am. Jur., Negligence, § 370; and see *Dambmann* v. *Metropolitan St. Ry. Co.*, 180 N.Y. 384, 386-387, mot. for rearg. den. 181 N.Y. 504.)"
>
> *Green* v. *Downs*, 27 N.Y. 2d 205, 208 (1970).

By failing to comply with this cardinal rule in the case at bar, it is submitted that the Trial Justice grossly prejudiced the right of the Rounicks to have the issue of proximate cause in this case considered by the jury in the factual context in which this issue was presented at the trial rather than in the general and purely abstract form in which the issue was actually presented to the jury.

See: *Fuchek* v. *Kutza*, 281 App. Div. 993, 994 (2nd Dept., 1953).

It is submitted that the Court could easily have done this without unduly emphasizing the point or leading the jury to believe that he considered the act of Kelly to be "an intervening act", by merely instructing the jury that this was the contention of the Rounicks but that it was for the jury itself to determine in the light of all the proof adduced at the trial whether or not the act of Kelly in closing the glass door behind the plaintiff was in fact an intervening cause that broke the chain of causation between the claimed negligence of the Rounicks and the injury sustained by the infant plaintiff.

CONCLUSION

The judgment against the Rounicks should be reversed and the complaint against said defendants should be dismissed. In any event, there should be a new trial of the action based upon prejudicial legal error committed by the Trial Justice.

Dated: New York, New York, July 23, 1974.

Respectfully submitted,

DANIEL J. COUGHLIN,
Attorney for Defendants-Appellants, Jack Rounick and Lois Rounick.

WILLIAM F. MCNULTY,
ANTHONY J. MCNULTY,
Of Counsel.

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ited States Court of Appeals for the Second Circuit

nee Kalshceur, a minor, etc.,
Plaintiffs-Appellees,
against
ck Rounick and Louis Counick,
Defendants-Appellants,
and
5 East 68th Street, Inc.,
Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

New York, County of New York **ss.:**

rnard S. Greenberg, , **being duly sworn deposes and says that he is** ent for Daniel J. Coughlin, **the attorney for the above named** pellants Rounick **herein. That he is over 21 years** **s not a party to the action and resides at** 162 East 7th Street, New York, NY

the 29th **day of** July , 1974 , **he served the within**
Brief for Appellant Rounick
upon Kremer, Krimsky & Luterman P. C.
for the above named Plaintiffs-Appellees

iting 3 true copies **of the same securely enclosed in a post-paid wrapper** **ost Office regularly maintained by the United States Government at** **h Street, New York, New York**

to the said attorneys for the Plaintiffs-Appellees
One East Penn Square, Phialdelphia, Pennsylvania 19107

at being the address within the state designated by t hem for that purpose, or the **ere they then kept an office, between which places there then was and now is a regular** **cation by mail.**

before me, this 29th
July 1974

Bernard S Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975